

No. 295.

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JAMES H. MCKENNEY
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Ex. of Hinrichs for D. C.
Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Nov. 9, 1901.
No. 295.

FRANK R. MOORE, as United States Collector of Internal
Revenue, First District, State of New York,

Plaintiff in Error,

v/s.

MAX RUCKGABER, Sr., as Sole Executor of the Last Will and
Testament of Louisa Augusta Ripley-Pinède, deceased,

Defendant in Error.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

Brief on Behalf of Defendant in Error.

FREDERIC W. HINRICHS,

ALFRED E. HINRICHS,

Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1900, NO. 295.

FRANK R. MOORE, Collector of
Internal Revenue,
Plaintiff in Error,

AGAINST

MAX RUCKGABER, SR., as Executor
of Louisa Augusta Ripley-Pinède,
deceased,
Defendant in Error.

On a Certificate
from the U. S.
Circuit Court of
Appeals for the
Second Circuit.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement.

This action was begun by the defendant in error (plaintiff below), as executor, against the plaintiff in error (defendant below) to recover the amount of a tax assessed upon the residuary legacy under the will of Louisa Augusta Ripley-Pinède, and collected by the plaintiff in error, under the alleged authority of Sections 29 and 30 of the Act of June 13, 1898, known as the "War Revenue Law."

The case came up before Judge THOMAS, at a Circuit Court of the United States for the Eastern District of New York, upon a demurrer to the complaint inter-

posed upon the general ground that the complaint failed to set forth a cause of action.

The learned trial Judge wrote an opinion in favor of the executor, which is reported as *Ruckgaber vs. Moore*, 104 *Fed. Rep.*, 947, and judgment was entered overruling the demurrer. The Government took the case to the Circuit Court of Appeals for the Second Circuit upon a writ of error, and that Court, at the opening of the argument, announced that the questions involved must be certified to the Supreme Court.

The material facts, as set forth in the certificate, are briefly as follows :

The testatrix Louisa Augusta Ripley-Pinède died at Zürich, Switzerland, on September 25, 1898, being at that time a non-resident of the United States, and having, for at least eight years immediately preceding her death been domiciled in, and a permanent resident of, the Republic of France (fol. 2, p. 1). She left a will dated November 6, 1890, which was made in New York and in conformity to the laws of that State, where the testatrix was then sojourning, whereby she bequeathed all her personal property in the United States to her daughter, Carmela von Groll (fol. 3, p. 2), who was then, and is now, also a non-resident of the United States, domiciled in Germany (fol. 4, p. 3). Said will was probated in the Surrogate's Court of Kings County, New York, on February 17, 1899 (fol. 2, p. 1), and letters testamentary were thereupon issued to the defendant in error, a resident of said county and State, who alone qualified as executor (fol. 3, p. 2).

On or about the 15th day of June, 1899, upon the written demand of the collector of internal revenue for the First District of New York, and under protest, the executor did make and render in duplicate to the said collector a return of legacies arising from personal property of every kind whatsoever, being in charge or trust of said executor, passing from Louisa Augusta Ripley-Pinède to her said daughter by her will, as aforesaid. The personal property thus passing under the will of said testatrix was as follows :

Bonds and coupons of divers American corporations, valued at	\$90,134 27
1 share of stock of the Tribune Association, a New York corporation, valued at	7,500 00
An indebtedness from the firm of Schulz & Ruckgaber, of New York City	8,036 43
	<hr/>
	\$105,670 70

from which were deducted the expenses and commissions of administration, etc., leaving the amount of the legacy to the daughter one hundred and three thousand four hundred and twenty-four dollars. All of these bonds, coupons and stock certificate came into the possession of the said executor, and the claim against the firm of Schulz & Ruckgaber was collected by him. On the return so rendered by the executor, a tax was charged against him by the Commissioner of Internal Revenue under the alleged authority of Sections 29, 30, and 31 of the said Act of Congress of 1898, known as the War Revenue Act, and by threat of distress and penalty the said executor was compelled to pay and did pay under protest to the said Collector the amount of said tax. Thereafter the said executor and defendant in error duly applied to the Commissioner of Internal Revenue to have the amount of said tax so paid refunded to him; but more than six months expired without any action by the said Commissioner on the application for refund, whereupon this action was brought to recover the tax (fols. 4 and 5, p. 3).

The questions of law certified to this Court upon the foregoing facts are as follows (fols. 6 and 7, p. 4) :

1. Can the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinède, actually located within the United States at the time of her death, September 25, 1898, be deemed to have a *situs* in the United States for the purpose of levying a tax or duty upon the transmission or receipt thereof under Sections 29, 30 and 31 of the Act of Congress entitled

"An Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13th, 1898 ?

2. Was the transmission or receipt of the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinède, which was actually located in the United States at the time of her death, September 25, 1898, subject to taxation under Sections 29, 30 and 31 of the Act of Congress entitled "An Act to provide ways and means to meet war expenditures, and for other purposes," approved June 13th, 1898 ?

The Ground of the Executor's Protest.

The executor's protest and his application for a refund, assign three reasons why the said tax should not have been imposed, to wit (fols. 5 and 6, pp. 3 and 4) :

FIRST. That Sections 29 and 30 of the said statute are unconstitutional and void.

This objection has, of course, been disposed of adversely to the executor by the recent decision of the Supreme Court in the case of *Knowlton vs. Moore*, 178 U. S., 41.

SECOND. That there was in a legal sense no personal property of the testatrix in the United States of America, because her estate here consisted of choses in action which had their *situs* at the domicile of the owner.

THIRD. That the tax imposed by the statute was not intended to extend to legacies given by the wills of non-residents of this country.

The second objection we think is valid, and the opinion of the Court below lays stress upon it. But it is upon the third point that we have from the beginning pinned our faith; and, in the interest of that point, that its primary and controlling importance may be emphasized among the arguments which will be laid before the Court in the government's brief in this case and those which will be presented in the briefs of distinguished counsel in the companion case brought by Martinez as administrator of Elizalde, we pass over the question of *situs* with a mere reference to indicate that we do not waive it.

It may be added that Judge THOMAS, upon sufficient allegations in the complaint, concluded that the testatrix was not only a non-resident, but an alien, and his opinion attaches some importance to that fact. We rest our case, however, for the purpose of this argument only, on the fact of non-residence, making no point of alienage,—and this also in the interest of brevity and clearness, in order that the point upon which we deem ourselves demonstrably right may not be obscured by the discussion of one upon which there seems, under the authorities, to be room for doubt.

POINTS.

The point, then, which we desire to emphasize is: That the tax imposed by the statute was not intended to extend to legacies given by the wills of non-residents of this country.

I.

Assuming (though not admitting) that Congress had power to impose a tax upon the legacy in question, the intention so to do has not been expressed in the act.

In other words, the question is simply one of construction. Does the act, in terms or by implication, extend to the estates of non-residents?

At the outset it should be said that this executor is not claiming an exemption; that is, some exceptional immunity from a general tax. We admit that exemptions are not favored; that they must be clearly made out; that an express exemption in favor (for example) of husband or wife is presumptively exclusive of any implied exemptions in favor of other persons. But we do not claim any exemption.

If the executor admitted that the act extended to non-residents generally, and yet claimed immunity for a citizen of France, he would be claiming an exemption. His actual contention is quite different; namely, that the act is confined to the estates of persons domiciled in the United States, and that its general or usual operation does not extend beyond that scope. He resists the tax because the law (in his opinion) says that estates of residents of the United States alone

shall be taxed. And to answer that the law says no such thing is to beg the principal question at issue.

From the very beginning of this controversy, the government has applied to our case the rules of construction applicable to alleged exemptions. Thus in reply to the argument submitted by us to the Commissioner of Internal Revenue before the imposition of the tax, he ruled that the tax must be paid *because he could not find in the statute any indication that Congress intended to EXEMPT the estates of non-residents.*

Vol. 1, Treas., Dec. (1899) No. 21,952.

It may be noted in passing, however, that he read nothing in the statute clearly extending its operation over such estates; for we find in his Annual Report for the year ending June 30th, 1899, a recommendation that the Act be amended by inserting the words "including persons residing abroad."

See,

Annual Report of the Commissioner of Internal Revenue, for the fiscal year ended June 30, 1899, page 89.

We submit that the rule of construction suggested by the Government is fundamentally wrong.

In order that this estate should escape the tax it is not necessary that an intention should be found in the statute to exempt the legacy; but on the contrary, in order that it may be subjected to the tax, there must be found in the Statute, either in express words or by necessary implication, an intention to include the legacy.

There is the most respectable authority for the proposition that statutes providing for taxation should be construed in favor of the subject and not in favor of the Government.

“ In the first place, it is, as I conceive, a general rule in the interpretation of all statutes, levying taxes or duties upon subjects or citizens, not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operation so as to embrace matters, not specifically pointed out, although standing upon a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the government, and in favor of subjects or citizens, because burthens are not to be imposed, nor presumed to be imposed, beyond what the statutes expressly and clearly import.”

Story J., in U. S. vs. Wigglesworth, 2 Story, 373.

And whatever doubt may be thrown upon this rule for the construction of *general* tax laws, it certainly remains the rule of construction as to a statute imposing a legacy tax, such as this one is ; that is to say, a law imposing a *special* and not a general burden.

The following is from the opinion of ANDREWS, J., writing for the New York Court of Appeals, in the *Matter of Enston*, 113 N. Y., at page 177, a case arising out of the first legacy tax law in New York, and holding it to be inapplicable to non-residents' estates.

“ The tax imposed by this act is not a common burden upon all the property or upon all the people within the State. It is not a general but a special tax, reaching only to special cases and affecting only a special class of persons. The executors in this case do not, therefore, in any proper sense, claim exemption from a general tax or a common burden. Their claim is that there is no law which imposes such a tax upon the property in their hands as executors. If they were seeking to escape from a general tax-

"ation or to be exempted from a common burden
 "imposed upon the people of the State generally,
 "then the authorities cited by the learned coun-
 "sel for the people, to the effect that an exemp-
 "tion thus claimed must be clearly made out,
 "would be applicable. But the executors come
 "into court claiming that the special taxation
 "provided for in the law of 1885 is not applicable
 "to them, or the property which they represent.
 "**In such a case they have the right,**
 "**both in reason and in justice, to claim**
 "**that they shall be clearly brought**
 "**within the terms of the law before**
 "**they shall be subjected to its burdens.**
 "**It is a well-established rule that a**
 "**citizen cannot be subjected to special**
 "**burdens without the clear warrant of**
 "**the law."**

And while, under the present inheritance tax law of the State of New York, estates of non-residents are taxed, the result followed an amendment, which included non-residents by unmistakable words.

Section 220 of the Tax Law (Laws of New York, 1896, Chap. 908) reads as follows :

"A tax shall be, and is hereby imposed * * *
 "when the transfer is by will or intestate law of
 "property within the State, and the decedent was
 "a **non-resident** of the State at the time of his
 "death."

The leading case upon this subject in England, whether the English statute be distinguishable from the United States Statute or not, also evidences the reluctance of the courts to extend death duties to estates of non-residents, if they be not clearly included.

See *Thomson vs. The Lord Advocate* (House of Lords), 12 Cl. & Fin., page 1.

And the reason for this reluctance is plain. A legacy tax or tax on distributive shares is, in effect, a modification of the Law of Wills and Administration ; it is a partial denial of the right to dispose of property by will or intestacy. But by international comity the law of the domicile governs the disposition of personal property ; and while the power of a sovereign to modify, or to deny in part, or even in whole, a rule of comity cannot be questioned, yet a statute tending to violate such a rule of comity, like one in derogation of the common law, should be strictly construed ; and an intention to change the law ought not to be presumed.

We, therefore, contend that the tax should not have been collected, if only for the reason that there is nothing in the act necessarily extending its operation to non-residents. If the question of construction is a doubtful one, the rules of international courtesy should have the benefit of the doubt.

II.

The executor not only contends that he is not expressly nor by necessary implication included in the statute ; but, further, that the statute by express words excluded from taxation the legacy in his hands.

Those portions of the statute which affect this controversy read as follows :

" SECTION 29. That any person having in charge
 " * * * as administrator, executor, etc.,
 " * * * any legacies or distributive shares
 " arising from personal property * * * *pass-*
 " *ing* after the passage of this Act, from any per-
 " son possessed of such property *either by will or*
 " *by the intestate laws of any State or territory*
 " * * * to any person * * * shall be
 " * * * made subject to a duty or tax."

" SECTION 30. The tax or duty aforesaid shall
 " be a lien * * * and every executor * * *
 " before payment to the legatees * * * shall
 " *pay to the Collector * * * of the district of*
 " *which the deceased person was a resident*, the
 " amount of the duty or tax assessed."

Here the very language of the statute shows that non-residents are excluded, for it is provided that the tax shall be paid to the Collector of the district of which the deceased **was a resident**. There is nowhere in the act an express direction for the payment of the tax if deceased was a non-resident.

III.

The Recent Amendment.

Of course this case must be governed by the original statute under which it was brought, and is not directly affected by the amendment of the act passed at the second session of the Fifty-sixth Congress long after the action was begun (*U. S. St. at Large, Vol. 31, part 2, p. 946*). Therefore the questions certified to this Court refer to the original act only.

But it is familiar doctrine that "an amendment
 " must be regarded as a legislative declaration that the

“law did not, as originally passed, embrace the provisions which the later act supplies.”

In re Harbeck, 161 N. Y., at page 218.

Now, the War Revenue Act, as originally passed, and as it bears upon the present case, contains no word referring to non-residents. This was brought to the attention of Congress by the annual report of the Commissioner of Internal Revenue, as we have pointed out above. And Congress at the last session amended Section 30 of the act (the administrative clause) by making it read: “That the tax or duty aforesaid shall be a lien * * * and every executor * * * before payment to the legatees * * * shall pay to the Collector * * * of the district of which the deceased person was a resident [*or in which the property was located in case of non-residents*], the amount of the duty or tax assessed.” The new matter is in brackets.

Here, then, we have a legislative declaration that the original act contained in its administrative clause no provision for collecting the tax from the estate of a non-resident.

It was argued below that the administrative clause, requiring the tax to be paid to the collector of the district whereof the deceased person was a resident, was permissive only, and not mandatory nor exclusive. That argument would have much weight, if the portion of the statute which imposes the tax made it clear that non-residents were within its purview; and the problem were merely to overcome the difficulty due to a clumsy drafting of the administrative clause. That is, if the tax were concededly due except that the method of its collection had not been defined.

But we have shown that the earlier section (No. 29) is not clearly to be extended to legacies given by non-residents. That being so, the clause requiring payment of the tax to the Collector of the district of which the deceased person was a resident, the absence of any ex-

press reference to non-residents, and the legislative declaration, to be inferred from the recent amendment, that the original act (as it applies to the case at bar) did not embrace any provision for the payment of the tax in case of non-residents, **amount to a demonstration that Congress in passing the Act did not have any but residents in mind.**

IV.

The reported cases support the executor's contention.

The Act of 1898, as far as we are informed, has not been construed upon the question now before the Court, except in the case at bar.

But the portions of the present law which are here material are, word for word, the same as Sections 124 and 125 of the Inheritance Tax Law of 1864, being Chapter 173 of the Statutes at Large of that year.

Under that law there were two decisions to the effect that estates of non-residents were not taxable; and, so far as we know, none to the contrary. The decisions referred to were:

United States vs. Hummelwell, 13 Fed. Rep., 617.

United States vs. Morris, 27 Fed. Rep., 341.

These cases are generally cited as authority. See, for example:

"*The War Revenue Law of 1898 Explained*," by Gould & Savary, pp. 110, 111.

Ash's Annotated Internal Revenue Laws, p. 415.
Note B.:

This, then, was the settled rule of construction under the former law. Is it not reasonable to believe that Congress in re-enacting the law, word for word, intended to adopt the construction which it had received ?

But even if this be not so, yet we submit with confidence that these cases were rightly decided and should be approved. The *Morris* case, while closely similar to the case at bar upon the facts, is briefly reported and rests upon the *Hunnewell* case. The latter was argued before Justices GRAY and LOWELL. It appeared there that decedent was a resident of France. By her will, executed under French law and proved in France, she gave certain property situated in Massachusetts to her son, also a resident of France. A copy of the will was filed and an executor appointed in Massachusetts, who took charge of the property in that Commonwealth. Mr. Justice GRAY, after stating the facts, proceeds as follows :

“ The question presented by the statement of
“ facts upon which the case has been submitted to
“ our determination, is whether this legacy is sub-
“ ject to a duty under the Act of Congress of June
“ 30th, 1864, Chapter 255, Sections 124, 125.

“ The cases cited at the bar exhibit some differ-
“ ence of opinion upon similar questions. In
“ Great Britain it has been determined, upon much
“ consideration, by the highest authority that an
“ Act of Parliament imposing a legacy duty does
“ not apply to property of a person whose domi-
“ cile at the time of his death is not within the
“ realm (*Thomson vs. Advo. Gen.*, 12 Clark & F.,
“ 1 ; s. c., 4 Bell, 1). In the courts of North Car-
“ olina and of Missouri, on the other hand, it has
“ been held that all personal property within the
“ State is liable to such duty, whether the owner's
“ domicile at the time of his death, is within or
“ without the State (*Albany vs. Powell*, 2 Jones

"Eq., 51 ; State vs. St. Louis County Court, 47 Mo., 594).

" But Congress, in the Act of 1864, has made its intention clear that the legacy duty should be payable on the estates of those persons only whose domicile at the time of their death is within the United States. Section 124 imposes a duty on legacies or distributive shares arising from personal property 'passing from any person possessed of such property, either by will or by the intestate laws of any State or Territory;' it does not make the duty payable when 'the person possessed of such property' dies testate, if it would not be payable if such person died intestate; and if Madame de la Valette had died intestate her son would not have taken a distributive share 'by the intestate laws of any State or Territory,' but, if at all, by the laws of France, the domicile of his mother at the time of her death. And Section 125, by requiring the executor or administrator to pay the amount of this duty to the Collector or Deputy Collector of the district of which the deceased person was a resident, leads to the same conclusion."

That this case was not carelessly decided, as the government charged below, is evident not only from the personnel of the Court, but from the opinion itself, which does not proceed upon any superficial reasoning, nor solely upon the most obvious point—that as to paying the collector of the district wherein the decedent resided. And that the case was not presented without exhaustive study by counsel, appears by their citations of authority from the Courts of England, of North Carolina and of Missouri.

But the reasoning of the Hunnewell case is attacked by the Government. Why, asked the District Attorney in his brief before the Circuit Court of Appeals, should Congress be deemed to have coupled testacy

with intestacy? What authority had Judge GRAY for saying that Congress could not have intended to tax a non-resident's estate passing by will, if it did not tax the same estate passing by intestacy? Our answer is: He had the authority of an established and unquestionable canon of construction, which requires that where a law will bear a construction which is just and reasonable, it must be so construed rather than in a manner to make it result in injustice and unreasonableness.

Knowlton vs. Moore, 178 U. S., at p. 77.

It is the general policy of our Courts to permit a non-resident to dispose of his American personal property according to the law of his domicile, whether that be the law of wills or the law of intestacy. And a statute which should interfere with the rights of foreigners in regard to testacy, while leaving them unimpaired in regard to intestacy, would be purely arbitrary.

The just and reasonable construction is that of Mr. Justice GRAY: **That the statute is not intended to tax the passing of property by will, unless the tax would also be imposed in case of intestacy.**

Now, in the case at bar, if Madame Pinede had died intestate, her property would not have passed by the law of any State or Territory, but by the laws of France. Hence there should be no tax upon the legacy passing by her will.

True, even in case of intestacy, the estate of Madame Pinede, in order to avail itself of her American assets, might have found it necessary to be represented by an ancillary administrator, appointed in one of our States, and acting by authority of its laws. He might have collected the debts and possessed the

stock certificate, and would thus have been an "administrator having in charge or trust a distributive share arising from personal property;" just as under the actual facts of the case at bar the defendant in error was an executor appointed by a State Court and having in charge or trust a legacy. Therefore, it is argued, the act applies by virtue of its general terms, and we are seeking to establish an exception. But this is a manifest fallacy; for not every legacy or distributive share in charge or trust of an executor or administrator is taxed, but only such legacy or share "*passing* after the passage of this act, by will or by the intestate laws of any State or territory."

It is now settled by the Knowlton case that not the property, nor the probate, nor the administration, but the *passing* of the property is the subject of the tax.

In cases of ancillary administration, the property *passes* to the distributees by the law of the domicile. The law of the place where an ancillary administrator is appointed governs his appointment and his acts in possessing himself of the property and transmitting it to the original administrator; or it may even authorize him to make distribution, as is provided by Section 2701 of the New York Code of Civil Procedure. *But the State law in no degree governs the succession or passing.* That is regulated by the foreign law. Thus the New York Code provides, in Section 2694:

"Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of any [personal] property situated within the State, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the State or country of which the decedent was a resident at the time of his death."

The fact that the laws of the State of New York are to some extent applied to for the purpose of securing

control of the estate, would afford a basis for a probate tax or the like, but not for a legacy or succession tax.

As was said by Lord Chief Justice TINDAL, in the House of Lords case of *Thomson vs. the Advocate General* (cited above), where a similar consideration was urged as a reason for imposing the tax :

“ The liability to legacy duty does not depend
 “ on the act of the executor in proving the will in
 “ this country, or upon his administering here ;
 “ the question not being whether there be admin-
 “ istration in England or not, but whether the will
 “ and legacy are a will and legacy within the
 “ meaning of the statute imposing the duty ” (12
 Clark & Finlay at p. 19).

It remains but to deal with a point urged by the District Attorney before Judge THOMAS in the Circuit Court. For as we have not enjoyed the privilege of examining the brief which the Government will file in this Court, our only guide is found in the arguments before the Courts below. Our learned adversary did not admit that in case of intestacy the American personal property of Madame Pinède would have passed by the laws of France. When the New York Code, following the law of nations, declares that her property shall so pass, then (he said) the law of France becomes, so far forth, the “ law of a State ” within the meaning of the Act ; and the passing is taxable.

There is little to add to Judge THOMAS's refutation of this strange proposition. We quote from his opinion :

“ The answer to this is clear. The title to the estate transmitted springs from the foreign not the domestic law. The statute in this regard is declaratory.

“ In *Ennis vs. Smith*, 14 Howard, 424, it is said by Mr. Justice WAYNE :

“ ‘ For several hundred years upon the Continent, and in England, from reported cases, for a hundred years the rule has been, that personal property, in cases of intestacy, is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the *jus gentium*. Lord THURLOW speaks of it as such in the House of Lords, in the case of *Bruce vs. Bruce*. Erskine, in his *Institutes of the Law of Scotland* (B. 3, tit. 9, sec. 4,644), says, this rule is founded on the laws of nations.’

“ Mr. Justice WAYNE calls attention to one of the reasons for the rule given by Lord Hardwicke, in these words so pertinent to the present controversy :

‘ A contrary rule would be extremely mischievous and would effect our commerce. No foreigner could deal in our funds but at the peril of his effects going according to our laws, and not those of his own country.’

“ In *Dammert v. Osborn*, 141 N. Y., 564, 567, it is said :

‘ The fundamental error that pervades all the reasoning of the learned counsel on this subject is to be found in the assumption that the courts of this State can annul a disposition of personal property in a foreign will, valid by the law of the domicile, and distribute the property to claimants here, contrary to the terms of such disposition, as interpreted by the law under which it was made. No controlling authority can be found in support of such a proposition.’

“ In *Cross v. U. S. T. Co.*, 131 N. Y., 330, 339, Judge O'BRIEN states :

‘ It is a general and universal rule that personal property has no locality. It is subject to the law of the owner's domicile as well in respect to a dis-

position of it by act *inter vivos*, as to its transmission by last will and testament, and by succession upon the owner dying intestate. This is, in substance, the language on which Judge DENIO stated the law in this court, and which he concisely and clearly extracted from the authorities cited by him (Parsons v. Lyman, 20 N. Y., 112). The learned Judge added that 'the principle, no doubt, has its foundation in international comity, but it is equally obligatory, as a rule of decision on the courts, as any legal rule of purely domestic origin. It does not belong to the Judges to recognize or to deny the rights which individuals may claim under it at their pleasure or caprice; but it having obtained the force of law by user and acquiescence, it belongs only to the political government of the State to change it whenever a change becomes desirable.'

* * * Should our legislature deem it for the public good to repeal the statute relating to wills and provide that all property should, upon the death of the owner, pass under the laws of intestacy, a disposition by will of personal property, actually within the territory of the State, but owned by a person domiciled in another State, would still be valid, providing it was valid by the law which governed the owner.'

"These quotations are not made because the rule stated by them is in doubt, but for the purpose of meeting the suggestion of the defendant [below] that the Code of Civil Procedure is the primary source of the power to transmit, or of the power to receive. Such statute is merely declaratory of the law. It is not the source of title, but simply points out in general terms where the courts shall look for the law which governs the transmission of title."

We have but a word to add to this quotation from the opinion below.

In construing a statute, the rule is fundamental and elementary that its words should preferably receive their usual and ordinary definition. **Now what, in the usual and ordinary acceptance of the words, is meant by the "laws of a State or territory?"** Surely that body of jurisprudence which is commonly and as a general rule administered there; that which the courts of the State are deemed to know and bound to enforce. It is in that sense that our courts speak of the law of their respective States; and they distinguish the law of the State from foreign jurisprudence, in those very cases where the latter furnishes the rule of decision. For foreign law is matter of fact. It must be alleged and proved, in cases where it is to control.

Hanley vs. Donoghue, 116 U. S., 1, at p. 4.

V.

Recapitulation.

1. The executor is not claiming exemption from a general law, but rather that he is not within the intent and purpose of a special law. The statute should therefore be construed fairly and liberally toward, and not with strictness against, the executor.

2. A legacy tax is a limitation upon the right of testamentary disposition. By the law of nations, non-residents are permitted freely to dispose of their personal property, wherever situated, by the law of their domicile.

3. It is not to be presumed that a nation intends to violate this well-established rule of comity.

4. It follows from 1, 2 and 3 that the Act does not extend to estates of non-residents, unless they are by express words or unavoidable implication included.

5. The express words, so far as they go, lead to the conclusion that non-residents are excluded, for the following reasons :

(a) The Act requires that the tax be paid to the Collector of the district wherein the decedent resided; there is no mention of non-residents, and the recent amendment amounts to a legislative declaration that non-residents were not within the purview of the Act as it stood when this action was begun.

(b) The Act imposes a tax only on legacies and distributive shares passing by will or by the intestate laws of a State or Territory. This means that an estate is not taxable in case of testacy, if it would not be taxable in case of intestacy. The personal property of a non-resident intestate passes by the law of his domicile, and not by the law of any State or Territory. It follows that non-residents are not within the intent of the Act, whether their property passes by will or by intestacy.

VI.

The questions certified by the Circuit Court of Appeals should be answered in the negative.

Respectfully submitted,

FREDERIC W. HINRICHs,

ALFRED E. HINRICHs,

Counsel for Defendant in Error.

OPINION

Supreme Court of the United States.

No. 295.—OCTOBER TERM, 1901.

Frank R. Moore
vs.
Max Ruckgaber, Executor, &c. } Upon certificate from the Circuit Court
of Appeals for the Second Circuit.

[March 17, 1902.]

This was also an action brought in the Circuit Court for the Southern District of New York by Ruckgaber, as executor of the last will and testament of Louisa Augusta Ripley-Pinède, against the Collector of Internal Revenue, to recover an inheritance tax paid to the defendant upon certain personal property in the city of New York.

The material facts, as set forth in the certificate, are briefly as follows:

The testatrix, Louisa Augusta Ripley-Pinède, died at Zürich, Switzerland, on September 25, 1898, being at that time a non-resident of the United States, and having, for at least eight years immediately preceding her death, been domiciled in, and a permanent resident of, the Republic of France. She left a will dated November 6, 1890, which was made in New York and in conformity to the laws of that State, where the testatrix was then sojourning, whereby she bequeathed all her personal property in the United States to her daughter, Carmelia von Groll, who was then, and is now, also a non-resident of the United States, domiciled in Germany. Said will was probated in the Surrogate's Court of Kings County, New York, on February 17, 1899, and letters testamentary were thereupon issued to the defendant in error, a resident of said county and State, who alone qualified as executor.

At the time of her death the testatrix owned a claim in account current against one Carl Goepel and one Max Ruckgaber, Jr., constituting the firm of Schulz & Ruckgaber, both of whom resided in the county of Kings and State of New York. She was also the owner of a share of stock in The Tribune Association, a New York corporation. The testatrix was also the owner of bonds and coupons of divers American corporations hereinafter particularly described. Said chose in action, stock, bonds and certificate constituted all the personal property of every kind in the United States of America referred to in the said will. The value of the said property of the testatrix at the date of her death, September 25, 1898, as fixed and determined by appraisers duly appointed, was \$105,670.70. On or about the 15th day of June, 1899, upon the written demand of the

collector of internal revenue for the first district of New York, and under protest the executor did make and render in duplicate to the said collector a return of legacies arising from personal property of every kind whatsoever, being in charge or trust of said executor, passing from Louisa Augusta Ripley-Pinède to her said daughter by her will, as aforesaid.

The following questions of law which arose out of the foregoing facts were certified to this court :

" 1. Can the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinède, actually located within the United States at the time of her death, September 25, 1898, be deemed to have a *situs* in the United States for the purpose of levying a tax or duty upon the transmission or receipt thereof under sections 29, 30 and 31 of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898?"

" 2. Was the transmission or receipt of the said personal property of the non-resident testatrix, Louisa Augusta Ripley-Pinède, which was actually located in the United States at the time of her death, September 25, 1898, subject to taxation under sections 29, 30 and 31 of the act of Congress entitled "An act to provide ways and means to meet war expenditures, and for other purposes," approved June 13, 1898?"

Mr. Justice Brown delivered the opinion of the Court.

This case differs from the one just decided only in the fact that the will of the non-resident testatrix was executed in New York, November 6, 1890, during a temporary sojourn there, although, as in the preceding case, the testatrix was domiciled abroad, and bequeathed her personal property in New York to a daughter, who was married, and also lived abroad.

There can be no doubt whatever that, if Madame Pinède had died intestate, the personal property would not have passed by the law "of any State or territory," (using the words of the act,) but by the laws of France. The question then is, whether the condition is changed, if the property pass under a will executed in this country. In the *United States v. Hunnewell*, (13 Fed. Rep. 617,) cited in the preceding case, the will was executed in France, but the decision of Mr. Justice Gray, holding that the tax was not payable, was not put upon the ground that the will was executed in a foreign country, but upon the broader ground that the legacy duty was payable only upon the estate of persons domiciled within the United States. In delivering the opinion he observed: "Section 124" (of the similar act of 1864) "imposes a duty on legacies or distributive shares arising from personal property 'passing from any person possessed of such property, either by will, or by the intestate laws of any State or territory;' it does not make the duty payable when 'the person possessed of such property' dies testate, if it would not be payable if such

person died intestate; and if Madame de la Valette had died intestate, her son would not have taken a distributive share 'by the intestate laws of any State or territory,' but, if at all, by the law of France, the domicile of his mother at the time of her death. And section 125, by requiring the executor or administrator to pay the amount of this duty 'to the collector or deputy collector of the district of which the deceased person was a resident' leads to the same conclusion."

The real question then is, as said by Mr. Justice Gray, whether the act makes the duty payable when the person possessed of such property dies testate, if it would not be payable if such person died intestate, although the actual question involved in this case differs from the one there involved, in the fact that in the Hunnewell case the will was executed abroad, while in the present case it was executed in this country.

Bearing in mind the fact that the tax in this case is not upon the property itself, but upon the transmission or devolution of such property, the question again recurs, as it did in the preceding case, whether the succession took effect in France or in New York. We are aided in the solution of this problem by the language of section 2964 of the New York Code of Civil Procedure, also cited in the preceding case, which is as follows: "Except where special provision is otherwise made by law, the validity and effect of a testamentary disposition of other" (than real) "property situated within the State, and the ownership and disposition of such property where it is not disposed of by will, are regulated by the laws of the State or country of which the decedent was a resident at the time of his death." Now as, if Madame Pinède had died without leaving a will, her property would have passed under the intestate laws of France and been exempt from this tax, it follows under the Hunnewell case that it is equally exempt though it passed by will.

The will of Madame Pinède is confined to her personal property in this country, and the record does not show whether she was possessed of other property in France or in any other foreign country. If she had, that property would either pass by will executed there or under the intestate laws of her domicile. For reasons stated in the prior opinion, we do not think Congress contemplated by this act that the estates of deceased persons should be split up for the purposes of distribution or taxation, but that, so far as regards personal property, the law of the domicile should prevail.

A question somewhat to the converse of this arose in the *Estate of Romaine*, (127 N. Y. 80,) which was a proceeding to compel payment of an inheritance tax by the administrator of the estate of Romaine, who had died intestate in Virginia, leaving a brother and sister resident in New York, as his next of kin. The act of 1887 subjected to an inheritance tax "all property which shall pass by will or by the intestate laws of this State,

from any person who may die seized or possessed of the same while a resident of this State, or if such decedent was not a resident of this State at the time of his death, which property or any part thereof shall be within this State." The question was whether the property of Romaine, who died in Virginia intestate, was subject to the tax. After deciding that the tax applied to two classes, namely, resident and non-resident decedents, the court observed: "But does it apply to all persons belonging to these two classes? It is not denied that it applies to all *resident* decedents, and to all non-resident *testators*, but it is contended that it does not apply to non-resident *intestates* because property 'which shall pass . . . by the intestate laws of this State' is expressly mentioned to the implied exclusion of property passing by the intestate laws of other States. This is the position of the appellant, whose learned counsel claims that the act, in its present form, was designed to meet cases of succession by will, but not of succession by intestacy, unless the intestate was a resident of this State. It is difficult, however, to see why the legislature should discriminate simply for the purpose of taxation between the property of a non-resident decedent who made a will, and of one who did not. It is not probable that there was an intention to tax the estates of non-resident testators and to exempt those of non-resident intestates, because there is no foundation for such a distinction. Property of the same kind, situated in the same place, receiving the same protection from the law, and administered upon in the same way, would naturally be required to contribute toward the expenses of government upon the same basis, regardless of whether its last owner died testate or intestate."

By parity of reasoning, we think it follows that no discrimination was intended to be made between non-residents who died testate, even though the will were made in this country, and those who died intestate; and as we have held in the preceding case that the law does not apply to non-residents who died intestate, or testate under a will executed abroad, we think it follows that it does not apply to deceased persons domiciled abroad who left property by will executed in this country.

The questions certified must, therefore, be answered in the negative.

Mr. Justice WHITE and Mr. Justice MCKENNA concurred in the result.

True copy.

Test :

